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DEC 19 2005

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina (26)

IN RE:

Danny Paul Messer and
Camala Lynn Messer,

Debtors.

C/A No. 03-04429-JW

Chapter 13

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court finds that Danny Paul Messer and Camala Lynn Messer (collectively referred to as "Debtors") are entitled to collect actual damages of \$96.70 in lost wages, \$2,859.00 in attorney's fees and costs, \$544.00 in damages for issuance of collection notices during the administration of this case, \$500.30 in damages for emotional distress, and \$4,500.00 in punitive damages from Citizens Building and Loan Association ("CBL") and its counsel, Ronald G. Bruce ("Bruce"), for a willful violation of the automatic stay. Accordingly, CBL and Bruce shall be jointly and severally liable to Debtors for a total judgment of \$8,500.00.

CBL and Bruce shall also withdraw or dismiss the foreclosure action against Debtors without prejudice and provide written notice of the withdrawal or dismissal to Debtors' counsel within five (5) days from entry of this order. Any failure to withdraw or dismiss the foreclosure action and provide notice of such to Debtors' counsel within the time prescribed herein shall result in additional sanctions against CBL and Bruce in the amount of \$500.00 for every day of non-compliance.

Columbia, South Carolina
December 19, 2005


UNITED STATES BANKRUPTCY JUDGE

ENTERED

DEC 19 2005

L. G. R.

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Chapter 13

ORDER

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L. G. R.

This matter comes before the Court upon a Motion for Sanctions filed by Danny Paul Messer and Camala Lynn Messer (hereinafter the Messers shall be collectively referred to as "Debtors"). Debtors filed the Motion for Sanctions against their mortgage creditor, Citizens Building and Loan Association ("CBL"), and its attorney, Ronald G. Bruce, Esq. ("Bruce") because Bruce filed a foreclosure action against Debtors in state court without obtaining relief from the automatic stay during the course of Debtors' ongoing bankruptcy case. In the Motion for Sanctions, Debtors request that Court find that CBL and Bruce willfully violated the automatic stay and award actual and punitive damages. After considering the evidence and legal arguments presented by Debtors, CBL, and Bruce, the Court concludes that Debtors, pursuant to § 362(h) of the Bankruptcy Code¹ are entitled to damages arising from a willful violation of the automatic stay.²

FINDINGS OF FACT

1. CBL holds a first mortgage on Debtors' residence in order to secure payments on a promissory note.

¹ "Bankruptcy Code," as used herein, refers to 11 U.S.C. § 101 et seq. prior to the amendments provided by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Furthermore, internal references to specific sections of the Bankruptcy Code shall be referenced by section number only.

² To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted such, and the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

2. On April 9, 2003, Debtors filed for bankruptcy relief under chapter 13 of the Bankruptcy Code.
3. On April 24, 2003, Debtors filed a chapter 13 plan in which Debtors proposed to pay an arrearage to CBL through their chapter 13 plan and resume making regular payments outside of the plan on May 2003. The Court confirmed Debtors' plan on June 13, 2003 without objection from CBL.
4. CBL filed a claim in Debtors' bankruptcy case on September 18, 2003. Additionally, CBL and Bruce received notice and service of Debtors' chapter 13 plan during the administration of the bankruptcy case, but they did not file objections to the plan.
5. Despite the fact that Debtors had filed their bankruptcy case, CBL would send Debtors a payment invoice that indicated the balance of their arrearage and applicable financing fees. Apparently, the invoices were generated by a computerized service utilized by CBL.
6. During the course of this bankruptcy case, Debtors failed to make certain regular payments to CBL outside of the plan in a timely manner. In response to the missed payments, Bruce attempted to contact Debtors' counsel to discuss the delinquency.
7. After several failed attempts to contact Debtors' counsel, Bruce filed a summons and complaint against Debtors on August 12, 2005 in order to file a foreclosure action against Debtors. Thereafter, Debtors were personally served with the summons and complaint.
8. After receiving the summons and complaint, Ms. Messer took leave from her employment for one hour to meet with counsel and obtain legal advice. She also missed

approximately 4 hours of work to testify at the hearing on the Motion for Sanctions. Debtor testified that she earns approximately \$19.34 per hour at her place of employment.

9. Bruce admitted that he intentionally filed the foreclosure action against Debtors in order get Debtors' counsel to return his phone calls. Bruce indicated the he and CBL did not intend to prosecute the foreclosure action so long as Debtors complied with the plan obligations. Furthermore, Bruce and CBL noted that they did not intend to cause damages to Debtors by filing the foreclosure action.

10. The record of Debtors' bankruptcy case also indicates that neither CBL nor Bruce obtained relief from the automatic stay from this Court prior to pursuing the foreclosure action against Debtors. Furthermore, at the time CBL and Bruce filed and served the summons and complaint, Debtors case was ongoing and had not been dismissed by the Court.

11. After receiving the summons and complaint, Debtors filed a Motion for Sanctions against CBL and Bruce for their violation of the automatic stay. Apparently, as of the hearing on the Motion for Sanctions, CBL and Bruce had not withdrawn or dismissed the state court foreclosure action.

12. In the Motion for Sanctions, Debtors seek compensation for actual damages for lost wages, attorney's fees, and emotional distress. Furthermore, Debtors also seek an award for punitive damages.

13. During the hearing, Debtors' counsel represented that Debtors incurred attorneys' fees and costs as damages because of CBL and Bruce's willful violation of the stay.

14. Given the time that Debtors' counsel committed to (1) conferences with Debtors and his staff in order to remedy the stay violation, (2) time expended drafting pleadings, and (3) attending the Motion for Sanctions hearing, it is clear that Debtors incurred some measure of attorney's fees and costs.

15. In light of such facts, the Court requested an affidavit of fees and costs from Debtors' counsel. The Court also provided CBL and Bruce an opportunity to file a response to the affidavit of fees and costs.

16. In the affidavit, Debtors' counsel provided a detailed description of his hourly rates and the activities associated with the billable hours charged to Debtors. The affidavit indicates a total fee of \$2,859.00 which is comprised of \$2,125.50 in attorney's fees, and \$733.50 in paraprofessional fees.

17. In response to the affidavit of fees submitted by Debtors' counsel, CBL and Bruce objected to the award of fees in light of the fact that they were not provided an opportunity to cross examine Debtors' counsel and his staff. CBL and Bruce also reiterated its defense to the Motion for Sanctions as an objection to any award of attorney's fees.

CONCLUSIONS OF LAW

Upon Debtors' filing of their bankruptcy petition, the automatic stay provided by § 362(a)³ of the Bankruptcy Code went into effect and stayed any actions by CBL to

³ In this case, Section 362(a) of the Bankruptcy Code, in pertinent part, provides as follows:

. . . [A] petition filed under section 301, 302, or 303 of this title, . . . ,
operates as a stay, applicable to all entities, of—

* * * *

(4) any act to create, perfect, or enforce any lien against property of the
estate; [and]

collect its claim. In re Johnson, No. 97-06698-W, 2001 WL 1806979 at *4 (Bankr. D.S.C. June 26, 2001). Furthermore, § 362(h) provides that “[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney’s fees, and in appropriate circumstances, may recover punitive damages.” Debtors must prove, by clear and convincing evidence, a willful violation and damages in order to recover under § 362(h). See Bolen v. Mercedes Benz, Inc. (In re Bolen), 295 B.R. 803, 807 (Bankr. D.S.C. 2002) (noting that party seeking to recover for a willful violation of the stay must prove violation by clear and convincing evidence). See also In re Sammon, 253 B.R. 672, 679 (Bankr. D.S.C. 2000) (holding that in order to recover under § 362(h), Debtors must prove the following: (1) that a bankruptcy petition was filed, (2) that the debtors are “individuals” under the automatic stay provisions, (3) that creditors received notice of the petition, (4) that the creditors’ actions were in willful violation of the stay, and (5) that the debtors suffered damages.).

The undisputed facts of this case demonstrate that Debtors filed a chapter 13 bankruptcy petition on April 9, 2003. There is no dispute that Debtors are “individuals” entitled to recover under § 362(h). Furthermore, at the time of the service of the postpetition invoices and the filing of the foreclosure action against Debtors, the evidence indicates that CBL and Bruce had notice of Debtors’ chapter 13 filing, and knew that Debtors were involved in an ongoing bankruptcy case. Therefore, determining whether the filing of the foreclosure action and sending Debtors payment invoices constitute a

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title

“willful violation” under § 362(h) and determining any amount of damages that Debtors may be entitled to collect are the only remaining issues to address.

I) “Willful Violation” of the Automatic Stay

In the Fourth Circuit, a willful violation of the stay occurs “when a creditor knows of the pending bankruptcy petition and intentionally attempts to continue collection procedures in spite of it.” Bolen v. Mercedes Benz, Inc. (In re Bolen), 295 B.R. 803, 807 (Bankr. D.S.C. 2002) (citing cases). In this case, CBL and Bruce knew that Debtors were involved in an ongoing bankruptcy case; yet they filed the foreclosure action despite their knowledge of the case. Under the circumstances of this case, it is clear that CBL and Bruce have committed a willful violation by filing a foreclosure action against Debtors. Bruce attempts to mitigate the willfulness of its act by asserting that neither he nor CBL intended to cause harm to Debtors. Bruce further asserts, after the fact, that neither he nor CBL intended to foreclose on Debtors residence, and that he filed the foreclosure action in order to force Debtors’ counsel to respond to his phone calls and ensure Debtors’ compliance with the plan. Despite Bruce’s assertions, the Court concludes that the filing of the foreclosure action constitutes a willful violation of the stay. Boone v. Federal Deposit Insurance Corp. (In re Boone), 235 B.R. 828, 833-34 (Bankr. D.S.C. 1998) (“A ‘willful violation’ does not require specific intent to violate the automatic stay. Rather [§ 362(h)] provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional”).

II) Damages

A) *Lost Wages*

Section 362(h) permits debtors to collect actual damages, including attorney's fees and costs, and punitive damages as a remedy for a willful violation of stay. Ms. Messer testified that she missed approximately five (5) hours of work⁴ in connection with CBL and Bruce's willful violation of the stay. Accordingly, since Ms. Messer demonstrated that she earns \$19.34 per hour at her place of employment, she is entitled to recover \$96.70 in lost wages as compensation for the time spent pursuing the Motion for Sanctions.

B) *Attorney's Fees and Cost*

In the Motion for Sanctions, Debtors also sought damages for the attorney's fees and costs that they incurred as a result of CBL's foreclosure action. The record of this case and testimony from Debtors and the staff of Debtors' counsel indicate that counsel held conferences with Debtors and his staff, filed pleadings in this case, and prosecuted a willful violation of stay action at a hearing. Section 362(h) states "[a]n individual injured by a willful violation of the stay provided by this section shall recover actual damages, *including costs and attorney's fees....*" 11 U.S.C. § 362(h) (emphasis added). Therefore, in light of the clear record that Debtors' counsel and his staff met with Debtors and expended time attempting to remedy the willful violation of stay committed by CBL and Bruce, the Court concludes that Debtors are entitled an award of attorney's fees. See 11 U.S.C. § 362(h) (providing that debtor injured by a willful violation of the stay "shall recover actual damages, including costs and attorney's fees"). See also Young v. Elite

⁴ One (1) hour to obtain legal advice after being served with the foreclosure action and four (4) hours to attend the hearing on the Motion for Sanctions.

Financial Services, Inc. (In re Young), C/A No. 04-10260, Adv. Pro. No. 04-80353, slip op. at 6-7 (Bankr. D.S.C. Sep. 15, 2005) (awarding attorney's fees and costs as actual damages for a willful violation of stay); Rupe v. Providian National Bank and Presidio, LLC (In re Wymer), C/A No. 02-15468-W, Adv. Pro. No. 95-8130, slip op. (Bankr. D.S.C. Jun. 20, 2003) (same); In re Bolen, 295 B.R. at 812 (same); In re Boone, 235 B.R. at 838 (same).

Although the specific amounts of attorney's fees and costs were not developed in detail during the hearing, the Court took the willful violation of stay matter under advisement, and provided Debtors' counsel an opportunity to submit an affidavit of fees and costs to the Court. Furthermore, the Court provided CBL and Bruce an opportunity to respond to the fees and costs charged by Debtors' counsel.

In response to the affidavit of fees, CBL and Bruce asserted that they did not intend to prosecute the foreclosure action filed against Debtors and that the foreclosure filing was caused by failure to return phone calls by Debtors' counsel. Furthermore, CBL and Bruce objected to the award of fees because they were not provided an opportunity to cross-examine Debtors' counsel and his staff in order to determine the propriety of the fees charged. However, given the opportunity to review and comment upon the affidavit of fees, which provided the hourly rates of Debtors' counsel and staff and a detailed description of the activities undertaken with respect to every billable hour charged, CBL and Bruce failed to make any legal or factual assertions attacking the reasonableness or propriety of the fees charged to Debtors. Despite the absence of any substantive grounds attacking the reasonableness of the fees listed in the affidavit, the Court made an

independent review of the fees in the affidavit, and concludes that that \$2,859.00 is the reasonable amount of attorney's fees to award in this case.⁵

C) Damages for Collection Mailings

Debtors also contend that CBL's mailing of computerized collection statements constitute a willful violation of the stay. The record indicates that CBL was aware of Debtors' bankruptcy case, but continued to send Debtors collection notices. Although the collection notices were not created by CBL, they were sent on behalf of CBL, and CBL took no actions to prevent or discontinue remittance of the statements to Debtors. Furthermore, the mailing of the collection notices confused Debtors and led them to the reasonable conclusion that CBL was continuing its efforts to collect its claim despite confirmation of Debtors' chapter 13 plan. Accordingly, the Court finds the mailing of the collection statements to be a violation of the automatic stay, and awards \$544.00 in damages under the circumstances of this case. See Rupe v. Providian Nat'l Bank and Presidio, LLC (In re Wymer), C/A No. 02-15468-W, Adv. Pro. No. 03-80042-W, slip op. (Bankr. D.S.C. June 20, 2003) (finding a willful violation of the stay subject to sanctions where creditor, through a third party collection agent, mailed debtors collection letters and made harassing phone calls both of which resulted in damages to debtors); Deleon v. United States (In re Deleon), C/A No. 93-72315-D, Adv. Pro. No. 95-8130, slip op. (Bankr. D.S.C. Apr. 12, 1996) (holding that Department of Veterans Affairs' mailing of

⁵ In order to determine the reasonableness of the attorney's fees and paraprofessional fees charged by Debtors' counsel, the Court utilized the lodestar method adopted by Fourth Circuit in Daly v. Hill, 790 F.2d 1071, 1077 (4th Cir. 1986). Furthermore, the Court also referenced attorney fee awards for § 362(h) litigation in prior cases in order to determine the reasonableness of fees and costs awarded herein. See Rupe v. Providian National Bank and Presidio, LLC (In re Wymer), C/A No. 02-15468-W, Adv. Pro. No. 95-8130-W, slip op. (Bankr. D.S.C. Jun. 20, 2003) (awarding \$2,400.00 in fees and costs); In re Bolen, 295 B.R. at 812 (awarding \$5,000.00 in fees and costs); In re Boone, 235 B.R. at 838 (awarding \$4,000.00 in fees and costs).

computerized collection notices constituted a willful violation of the automatic stay and awarding co-debtors \$500.00 in damages).

D) Emotional Distress Damages

Debtors also sought damages for the emotional distress caused by the filing of the foreclosure action. Debtors were upset by receiving the summons and complaint that were filed in violation of the stay. However, there was no evidence of severe stress or medical problems related thereto. Furthermore, Ms. Messer received legal advice shortly after being served with the foreclosure action. Therefore, the Court awards \$500.30 in actual damages for emotional distress.

E) Punitive Damages

Debtors have also made a claim for punitive damages. In light of the egregious nature by which CBL and Bruce filed the foreclosure action despite being fully aware that Debtors were involved in an ongoing bankruptcy case, the Court finds an award of punitive damages appropriate. Under the circumstances of this case, Bruce filed the foreclosure action against Debtors without any statutory basis and failed to obtain relief from the stay pursuant to the prescribed procedures provided by § 362. Although, CBL and Bruce assert, at the hearing, that they did not intend to pursue the foreclosure action if Debtors remain current on their plan payments, CBL and Bruce remain liable for a willful violation of the stay. Furthermore, the Court notes that neither CBL nor Bruce have withdrawn the improperly filed foreclosure action. Even if the Court considers the fact that the failure of Debtors' counsel to return Bruce's phone call in a timely manner may have led Bruce to file the foreclosure action out of frustration with Debtors' counsel, the blatant and uninformed violation of stay by CBL and Bruce cannot be

condoned. Accordingly, under the circumstances of this case, the Court awards Debtors \$4,500.00 in punitive damages.

III) Conclusion

In light of the foregoing analysis provided herein, the Court concludes that CBL and Bruce committed a willful violation of the automatic stay pursuant to § 362(h). Furthermore, CBL and Bruce shall be jointly and severally liable to Debtors for \$96.70 in lost wages, \$2,859.00 in attorney's fees and costs, \$544.00 in damages for the issuance of collection notices during the administration of this case, \$500.30 in damages for emotional distress, and \$4,500.00 in punitive damages for a total judgment amount of \$8,500.00.

CBL and Bruce shall also withdraw or dismiss the foreclosure action without prejudice and provide written notice of the withdrawal or dismissal to Debtors' counsel within five (5) days from entry of this order. Any failure to withdraw or dismiss the foreclosure action and provide notice of such to Debtors' counsel within the time prescribed herein shall result in additional sanctions against CBL and Bruce in the amount of \$500.00 for every day of non-compliance.

AND IT IS SO ORDERED.

Columbia, South Carolina,
December 19, 2005


UNITED STATES BANKRUPTCY JUDGE